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Supreme Court, U.S.
FILED
MAY 28 1998
CLERK

No. 97-7213

In The

Supreme Court of the United States

October Term, 1997

SYLVESTER MOSLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Petition For Certiorari Filed December 22, 1997
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SYLVESTER MOSLEY V. UNITED STATES
NO. 97-7213

RELEVANT DOCKET ENTRIES*
Criminal No. 96-12 (D.N.J.)

Date	Proceedings
1/4/96	Indictment filed.
1/17/96	Defendant's arraignment and plea of not guilty.
3/4/96	Trial before the Honorable Alfred J. Lechner, Jr., United States District Judge for the District of New Jersey and a jury.
3/5/96	Trial before the Honorable Alfred J. Lechner, Jr., United States District Judge for the District of New Jersey and a jury. Testimony concludes. Defendant requests that jury be instructed on Bank Larceny Offense. Request denied.
3/5/96	Jury verdict of guilty.
12/9/96	Judgment entered.
12/13/96	Defendant's Notice of Appeal filed.
1/23/97	Amended Judgment entered.

*Text of entries edited for clarity.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	Criminal No.
v.	(96-12 AJL)
SYLVESTER MOSLEY	Hon.
	18 U.S.C. §§ 2113(a) & 2

INDICTMENT

(Filed Jan. 4, 1995)

The Grand Jury, in and for the District of New Jersey, sitting in Newark, charges:

COUNT 1

On or about November 20, 1995, at Paterson, is Passaic County, in the District of New Jersey, and elsewhere, the defendant,

SYLVESTER MOSLEY,

did knowingly and willfully, by force and violence and by intimidation, take from a teller approximately $9,334.81 belonging to and in the care, custody, control, management, and possession of the First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey, whose deposits were then insured by the Federal Deposit Insurance Corporation.

In violation of Title 18, United States Code, Sections 2113(a) and 2.

COUNT 2

On or about November 9, 1995, at Paterson, in Passaic County, in the District of New Jersey, and elsewhere, the defendant,

SYLVESTER MOSLEY,

did knowingly and willfully, by force and violence and by intimidation, take from a teller approximately $2,547.30 belonging to and in the care, custody, control, management, and possession of the First Fidelity Bank, 1008 Madison Avenue, Paterson, New Jersey, whose deposits were then insured by the Federal Deposit Insurance Corporation.

In violation of Title 18, United States Code, Sections 2113(a) and 2.

A TRUE BILL

_____

FOREPERSON

/s/ Faith S. Hochberg
FAITH S. HOCHBERG
United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	CRIMINAL NO. 96-12-01
v.	HONORABLE ALFRED J. LECHNER, JR.
SYLVESTER MOSLEY	

DEFENDANT'S REQUESTS TO CHARGE

Donald J. McCauley, Esq.
Assistant Federal Public Defender
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Attorney for Defendant
Sylvester Mosley

BANK LARCENY

Mr. Mosley's defense in this case is that his conduct constituted the crime of Bank Larceny in violation of 18 United States Code Section 2113(b) rather than Bank Robbery in violation of United States Code Section 2113(a).[1]

[1] "Every criminal defendant is entitled to have his theory of the case, if it could amount to a legally sufficient defense based upon the evidence presented at trial, fairly submitted to the jury." *United States v. Burke*, 700 F.2d 70, 81 (2d Cir. 1983); See also *United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972). (A trial court is "bound to give the substance of a requested instruction relating to any defense theory for which there [is] any foundation in the evidence.")

I have already charged you as to the four essential elements that the government must proved beyond a reasonable doubt to establish the crime of Bank Robbery. To establish the crime of Bank Larceny, there are also four essential elements that must be proved beyond a reasonable doubt.

The elements of Bank Larceny are:

For Count 1:

First: That the defendant took money that was in the care, possession, control and custody of the First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey; and

Second: That the defendant took the money for his own use and benefit knowing that it did not belong to him; and

Third: The money was worth more than $100; and

Fourth: The First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey is insured by the Federal Deposit Insurance Corporation, a member of the Federal Reserve System.

If you find that the government proved each of these elements beyond a reasonable doubt, then you must find the defendant guilty of Bank Larceny as to Count One.

For Count 2:

First: That the defendant took money that was in the care, possession, control and custody of the First Fidelity Bank, 1008 Madison Avenue, Paterson, New Jersey; and

Second: That took the money for his own use and benefit, knowing that it did not belong to him; and

Third: The money was worth more than $100; and

Fourth: The First Fidelity Bank, 1008 Madison Avenue, Paterson, New Jersey was insured by the Federal Deposit Insurance Corporation, a member of the Federal Reserve System.

If you find that the government proved each of these elements beyond a reasonable doubt, then you must find the defendant guilty of Bank Larceny as to Count Two.[2]

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[2] Potuto, Saltzburg & Perlman, *Federal Criminal Jury Instructions*, Second Edition (1993 Supplement)

UNITED STATES v. SYLVESTER MOSLEY, U.S. District Court, D.N.J., Criminal No. 96-12

[265] MR. McCAULEY: We have no objection to all the other charges requested by the Government.

THE COURT: Okay.

MR. McCAULEY: In its submission that we also reviewed last Thursday.

I had one request and that is the lesser included offense. Essentially, Mr. Mosley's defense in this case is that he conceded, acknowledged his identity being the person that went into those banks and as the person who took the money from the banks and we did not challenge whether those banks were F.D.I.C. insured by the Federal Reserve System. Those were the remaining elements that the federal charge of bank robbery.

His defense was that his conduct in this case did not satisfy the elements of bank robbery in violation of 18 U.S. Code Section 2113(a), but rather the following section, Section 2113(b), which is the bank larceny charge.

I've submitted a request to charge regarding the bank larceny. The Government did not object to the proposed charge in terms of my proposal and the language. They object to whether it's given or not, but if your Honor chooses to give it, they have no objection –

THE COURT: I understand the language is not in controversy but the charge certainly is.

MR. McCAULEY: All right.

[266] Then the – I submit and I had as a footnote to the request to charge, that every defendant is entitled to

have his theory of the case, if it could amount to a legally sufficient defense, based upon the evidence presented at trial, fairly submitted to the jury.

And I cited *United States v. Byrd* for that case and also *United States v. Blair*, a Third Circuit case, which stated, "A trial court is bound to give the substance of the requested instruction relating to any defense theory for which there is any foundation in the evidence."

So the issue is whether there's been a foundation in the evidence.

THE COURT: Tell me what that is.

MR. McCAULEY: It's the testimony of Special Agent Conway as to whether or not there was a foundation –

THE COURT: What was the testimony that establishes a basis for a lesser included charge of bank larceny?

MR. McCAULEY: The evidence is up to the jury –

THE COURT: No, you tell me what the evidence is first. It's up to the jury whether to accept it, but I want to know the factual basis that you established in this case to justify this charge.

MR. McCAULEY: The evidence given by Special Agent Conway.

It's the evidence of Miss Neufville in conjunction with [267] the testimony of Special Agent Zimmer. The jury has heard that Agent Zimmer testified that Miss Neufville gave inconsistent at the time of the event as to what her testimony is.

Now, the jury will be charged as to evaluating credibility. They may find that the statements given initially, as come out through the testimony of Agent Zimmer is more credible than the testimony that Miss Neufville gave and that would support a taking rather than the force, violence and intimidation.

THE COURT: May I interrupt you?

MR. McCAULEY: Yes.

THE COURT: I need the facts of what you're talking about. I don't recall any facts to establish a basis for this defense in the case, none at all. I'd like you to address what those facts are.

MR. McCAULEY: The facts regarding testimony of Agent Zimmer.

THE COURT: May I continue?

There is nothing to suggest that Mr. Mosley took this money from the bank, as if he reached over the counter and grabbed it from behind the counter and ran out, saw it sitting on a desk. There is nothing to suggest that at all.

There is only evidence to suggest that this money was pushed at him as a result of a threat and intimidation. There is nothing to suggest that he, by himself, without the force or [268] intimidating compliance from the bank officers, obtained this money. That's the problem I have and that's what I want you to address where the facts are to justify this.

If you merely say the evidence from Zimmer and the evidence from Conway established that, you're not helping me to decide your argument because you're being too

vague. I need to know what you say the facts are to demonstrate the absence of force and violence or intimidation and the existence of conduct solely on his part to obtain this money.

This money certainly was not given to him because he was entitled to it and the money was certainly not given to him based upon the voluntary conduct of either of these tellers. There's been no suggestion as to that.

So that's the problem I have.

MR. McCAULEY: With respect, all due respect, your Honor –

THE COURT: I know you don't mean with all due respect, so let's do away with that and get to the argument.

MR. McCAULEY: I do mean it.

With all due respect, the specific testimony of Agent Zimmer is that Miss Neufeld locked the drawer after giving him the money and walked away. Miss Neufeld testified she ran away, so the jury may discredit Miss Neufeld's testimony, accept Agent Zimmer's testimony. That would show that she was calm when she walked away.

[269] THE COURT: She was compliant in giving him this? Please don't roll your eyes or get upset. I'm asking you to give me facts. If you want me to sit here and just listen benignly to what you have to say, you haven't given me one fact yet.

I have a question – frankly, I'll withdraw the question, you go on and shoot in the dark. Go ahead, I don't

want to upset you, Mr. McCauley. Just shoot in the dark and just talk and I'll rule.

Go ahead.

MR. McCAULEY: I'm not upset.

THE COURT: I was going to ask you a question but I withdraw it. Go ahead.

MR. McCAULEY: Your Honor, I'm not upset.

THE COURT: No, please, go ahead.

MR. McCAULEY: I accept whatever –

THE COURT: What else would you like to say, Mr. McCauley?

MR. McCAULEY: That the defendant has a Sixth Amendment right to a trial with a jury, he has a right to present his defense, to present a defense right from the beginning.

Stated in the openings, we acknowledge we were there, we acknowledge we took the money and we said we did not do it by force, violence and intimidation. I believe there is evidence in the record to support where a jury could, in its decision [270] and its conclusion, that there was insufficient evidence for each of those elements.

I pointed to Agent Zimmer's testimony because they may discredit Miss Neufville all together if they find that there was some inconsistencies in her testimony, that they could then reject all of her testimony. So we would be left then with Mr. Mosley going in.

With respect to the 404(b), he pled guilty to the prior robbery. He understood that. He didn't go to trial on that. He did not contest the evidence.

Here, he did and he did cooperate. We have the testimony of Agent Conway where he was totally cooperative. He did not flee. He was quickly taken into custody, went back to the office and he answered all questions posed to him by Agent Conway.

There was nothing there, I submit, to the jury that they could conclude, that there was nothing there regarding threats of force or force or violence or intimidation.

Agent Conway testified that he used the term "hold up," but he never asked him to clarify that, whereas when he said we did the hold up, he did ask him to clarify the "we."

So the term "rob" does – it does have legal significance. I don't believe when you say just because people use the term in this trial robbery, whether it was a prosecutor or any witness, that that answers the question. That is a term [271] of legal significance requiring proof of essential elements.

We have the testimony of Miss Maccaratto, the teller adjacent. There was nobody in between her, regarding count two, and Monica Brown. She did not hear anything. She did not see anything.

The basis of that, the jury may conclude that Miss Monica Brown was overstating what was here and they may reject her testimony and that would always be the jury's decision as to credibility and that's why the jury should have the option of finding a violation of 18 U.S.C.

2113(b). Because if they're rejecting the credibility of these witnesses, they'll be left with nothing as to what happened here, which we acknowledge was wrong. And the crime we acknowledge, we just maintain it's not the crime charged of bank robbery.

We also have the testimony of Officer Medwick. He described Miss Monica Brown as being calm. He interviewed her right after the incident. The jury can accept his testimony and reject Miss Monica Brown's testimony that there wasn't any fear or intimidation.

So on the basis that we've produced testimony, that if accepted by the jury, would not amount to the elements of force, violence or intimidation, that we submit we're entitled to the lesser included offense of bank larceny.

We also have the testimony of Reverend McDowell. He's present with respect to count one. He's right behind – with [272] respect to count two. He's right behind Mr. Mosley. He doesn't see anything, he doesn't hear anything.

He sees Mr. Mosley calmly walk out of the bank. He also testified that he would characterize Miss Neufville's leaving of her station as a walking. So again, if they accept his testimony and reject Miss Neufeld's testimony, on the basis of that, they could find bank larceny or not find the requisite elements of bank robbery.

Thank you.

THE COURT: Anything further?

MR. McCAULEY: No.

THE COURT: I'll hear from the Government.

MR. KLINGEMAN: Briefly, your Honor. We have submitted a letter brief on this issue. I would incorporate that by reference.

I would also incorporate by the reference the arguments we made in opposition to the Rule 29 motion. There is simply no evidence in this record to support a bank larceny conviction and not a bank robbery conviction.

We ask your Honor to deny – not to give the bank larceny charge.

THE COURT: Anything further?

MR. McCAULEY: Yes, your Honor.

I have one additional request and it just came to mind in terms of making this. It's the false in one and false in [273] all.

THE COURT: Before we get to that, anything further with regard to this?

MR. McCAULEY: No.

THE COURT: All right.

I am not going to give the bank larceny charge. I gave defense counsel an opportunity to demonstrate to me what facts there were in the evidence to justify bank larceny charge. There simply are no facts in evidence to justify a bank larceny charge.

There is nothing to suggest that anything occurred in this case, other than what the Government has submitted for the charge, if the jury accepts the facts in this case. If

they reject it, then an acquittal. Obviously that will be in order in the case.

Clearly, there is no basis to suggest that this money was taken with the compliance of these tellers. There is nothing to suggest that the money was merely sitting on the counter and he grabbed it and ran out of the bank.

The evidence is clear that the money was in the cash drawers. As a result of his approach to each of the tellers, they were forced, through intimidation, to retrieve the money from the cash drawers and push it at him. There is nothing to suggest that this was a larceny as that term is used in 2113(a).

[274] The elements that the Government has to prove have been established by a prima facie evidence. Whether the jury accepts them or not is a different issue, but as a basis for a lesser included charge of bank larceny, it simply does not exist.

There is no other way this money could have been obtained. The jury may reject all the Government's arguments and return an acquittal, that's a different issue. There is certainly nothing to suggest that the charge, as requested by the defense, should be given in the case.

The application is denied.

You had another request?

MR. McCAULEY: Yes, your Honor.

The credibility of witnesses, the Government's request number eight, that you also include language that is the standard language as, I submit, false in one, false in all.

THE COURT: I'm going to tell the jury, as I did in the opening, they can accept everything a witness tells, reject everything a witness tells or accept a portion and reject a portion.

Anything else?

MR. McCAULEY: I would just ask a little more specificity regarding if they find that the witness has been falsely testifying in one respect, you may reject the total testimony.

---

[328] and November 20, 1995. It's the position of the United States that this conviction, as well as other pieces of evidence, demonstrate Mr. Mosley's intent to intimidate the bank tellers at the time of the crimes charges.

Now, it's proper to use this evidence to decide whether or not Mr. Mosley intended to intimidate the bank tellers. Should you chose [sic] to believe the evidence presented about the defendant's prior conviction for bank robbery, I caution you, you may use it only – you may use and consider this evidence only for the limited purpose I just described.

You may not use it to conclude the defendant is a bad person or that he was predisposed to do bad things. Therefore, you should only consider this evidence for the purpose with which I just discussed with you and in conjunction with these instructions. I stress, to consider the evidence for any other purpose would be improper.

Now, in this case, the federal Grand Jury returned a two-count indictment as you know. Count one charges that the defendant knowingly and willfully, by force and violence and by intimidation, took from the teller – took from a teller approximately $9,334 belonging to and in the custody, control, care, management and possession of First Fidelity Bank, 233 Fifth Avenue, Paterson, New Jersey. That these deposits were insured by the F.D.I.C.

Count two charges the same thing, that it was taken [329] knowingly and willfully, by force, violence and intimidation, that is the amount of $2,547 from a teller and that that money belonged to or was in the care,

custody, control, management or possession of First Fidelity Bank at 1008 Madison Avenue, Paterson. Again, it alleges that those deposits were insured by the F.D.I.C.

You're going to have a copy of that indictment with you in the jury room. I talked to you about that indictment twice now as to the purpose of the indictment.

Both of these counts charge that the defendant violated Title 18 of the United State Code, Section 2113(a). I'll read that to you in pertinent part.

It reads, "Whoever, by force and violence or by intimidation takes or attempts to take from the person or presence of another any money belonging to or in the care, custody, control, management or possession of any federally insured bank shall be guilty of a crime against the United States."

Now, there are four essential elements that must be proved by the Government beyond a reasonable doubt with regard to each count of the indictment. For count one, Government must prove: First, that Mr. Mosley took money from or in the possession of employees of the First Fidelity Bank at 233 Fifth Avenue, Paterson; second, that the money was in the care, custody, control, management or possession of First Fidelity [330] Bank, 233 Fifth Avenue, Paterson, at the time it was taken; third, that Mr. Mosley took the money by means of force, violence or intimidation; fourth, that at the time the money was taken from First Fidelity Bank at 233 Fifth Avenue, Paterson, the deposits of the bank were insured by the Federal Deposit Insurance Corporation.

Count two has exactly the same elements with the exception that the bank branch is at 1008 Madison Avenue. So the same four counts apply, but there is a different branch that is involved, same four elements apply in the second count.

Let me talk to you about the term "by force and violence or by intimidation." Let me define it for you.

That means either, one, the use of actual physical strength or actual physical violence or two, doing some act or making some statement to put someone in fear of bodily harm.

The requirement of taking by force and violence or by intimidation under Section 2113(a) is disjunctive. The Government need only prove force and violence or intimidation to establish its case. It does not have to prove both.

The Government contends in this case that the taking of money was by intimidation. If you so find beyond a reasonable doubt that the money was taken by intimidation, this element of the offense is satisfied.

Now, the word "intimidation" must be caused by an act knowingly and deliberately done and a statement knowingly and [331] deliberately made, willfully made by the defendant or made in such manner or under the circumstances that would produce such a reaction or such a fear of bodily harm in a reasonable person.

The United States does not have to prove that the behavior of Mr. Mosley was so violent that it was likely to cause terror, panic, hysteria. Further, the United States

does not have to prove that the alleged victim was actually frightened.

A taking would not be by means of intimidation, however, if fear on the part of the alleged victim resulted from that person's own timidity rather than from some intimidating conduct on the part of Mr. Mosley. The essence of the offense is the taking of money or property, aided and accompanied by an intentional intimidating behavior on the part of the defendant.

The phrase "care, custody, control, management or possession" means money or funds that were physically within the bank or within its power to control. When a bank holds money that has been deposited by its customers, for example, that bank has care, custody, control, management or possession of that money.

Now, counts one and two of the indictment also refer to Section 2 of Title 18 of the United States Code. Under that statute, the guilt of a defendant may be established without proof that he was the one who actually performed the acts [332] constituting the substantive crimes. That section provides in relevant part, as follows: "Whoever commits an offense against the United States or aids, abets, councils, commands, induces or procures its commission is punishable as a principle.

"Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principle."

Now, in other words, every person who willfully causes the commission of a crime or participates in it may

be found guilty of that offense. Causing or participating in a crime is willful if done voluntarily and intentionally, with a specific intent to do something the law forbids or to fail to do something the law requires to be done. That is to say with bad purpose, either to disobey or disregard the law.

Now, you must find that the Government, the United States has proved that the defendant knowingly and intentionally violated the law. A person acts knowingly if he acts voluntarily and intentionally and not because of some mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" is to insure that no one will be convicted of an act done because of a mistake or accident or other innocent reason. A person acts willfully or intentionally if he acts voluntarily and with the specific intent or purpose to do something the law forbids or with specific intent to omit something the law requires him to [333] do. In other words, with a bad purpose or evil intent to either disobey or disregard the law.

In determining whether the defendant has acted knowingly and willfully, it is not necessary for the United States to establish that he knew he was breaking any particular law. Ignorance of the law is no excuse, it is no defense in this case.

Now, knowledge may be proved by the defendant's conduct and all the facts and circumstances surrounding the case. Knowledge and intent exist in the mind. It's not possible to open somebody's head and look into somebody's mind. The only way you have to decide these questions is for you to consider all of the facts and

circumstances shown by the evidence and determine from such facts and circumstances whether the requisite knowledge was present at the time in question.

Again, what are we talking about? Circumstantial evidence. Direct proof is not necessary.

I point out to you that many crimes are seldom susceptible to direct proof. Here we have direct proof in many instances of what went on in the case should you accept that proof. In many instances, proof is circumstantial.

I'm suggesting that you need to consider all of the evidence in the case. You may consider a defendant's words or actions, as well as other facts and circumstances in evidence and the reasonable inferences from that evidence to determine [334] the defendant's state of mind and knowledge.

Now, you will note that the indictment charges that the offense took place on or about a certain date. The law requires only a substantial similarity between the dates as charged in the indictment and the dates mentioned during the testimony. The proof does not need to show with certainty the exact date on which the act occurred, just as long as you find the act or offense occurred on or reasonably near the dates specified in the indictment.

Upon reading the indictment, you may notice the word "and" is used, a-n-d, is used between other charge words. I specifically instruct you that it is sufficient to prove that the defendant did one of the acts charged. In other words, you should treat the conjunctive "and" a-n-d, as being the disjunctive "or," o-r.

Now, all of the evidence, whether I've mentioned it or whether counsel has referred to it, must be considered by you. It makes no difference whether the evidence was offered by the United States or by the defendant. It is all evidence and you are to consider it to the extent that it helps you decide the issues in the case.

Now, you are to determine the facts based upon the evidence as presented to you during the course of the trial. I've described to you the various concepts with which you're going to have to deal in deciding this matter.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Filed Dec. 9, 1996)

UNITED STATES OF AMERICA

vs.

SYLVESTER MOSLEY

(Defendant's Name)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
96-00012-01

Donald McCauley, Esq.
Attorney's Name

THE DEFENDANT:

_ pleaded guilty to count(s) _____
X was found guilty on count(s) 1 and 2
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

TITLE SECTION	NATURE OF OFFENSE	DATE OF OFFENSE	COUNTS
18:2113(a)	Bank Robbery	11/20/95	1
18:2113(a)	Bank Robbery	11/09/95	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_ The defendant has been found not guilty on counts _____ and is discharged as to such count(s).

_ Count(s) _____ (is)(are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $100.00, for count(s) 1 and 2, which shall be due X immediately _ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
147-40-6342 or 147-40-6324; 147-12-6342; 147-40-6345

Defendant's Date of Birth:
11/18/48 or 11/28/48

December 9, 1996
Date of Imposition of Sentence

Defendant's Address:
Union County Jail
15 Elizabeth Plaza
Elizabeth, NJ 07202

/s/ Alfred J. Lechner
Signature of Judicial Officer

Hon. Alfred J. Lechner, Jr., U.S.D.J.
Name & Title of Judicial Officer

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 210 months on each of Counts 1 and 2 to run concurrently.

_ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district.

_ at ___ a.m. on _____.
_ as notified by the United States Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

_ before a.m./p.m. on _____.
_ as notified by the United States Marshal.
_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

___ Defendant delivered on _____ to _____

_____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on each of Counts 1 and 2 to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant must submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer. If this judgment imposes a restitution obligation, it shall be a conditions [sic] of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to assure compliance. It is further ordered that the defendant shall submit to drug treatment on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of the program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

_ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: VI

Imprisonment Range: 210 to 262 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500.00 to $ 175,000.00

X Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ 0

X Full restitution is not ordered for the following reason(s):

Inability to pay full restitution.

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

_ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range.

_ upon motion of the government, as a result of defendant's substantial assistance.

_ for the following reason(s):

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

(Filed Jan. 23, 1996)

UNITED STATES OF AMERICA

vs.

SYLVESTER MOSLEY

(Defendant's Name)

AMENDED

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 96-00012-01

Donald McCauley, Esq.
Attorney's Name

THE DEFENDANT:

_ pleaded guilty to count(s) _____

X was found guilty on count(s) 1 and 2 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s) which involve the following offenses:

TITLE SECTION	NATURE OF OFFENSE	DATE OF OFFENSE	COUNTS
18:2113(a)	Bank Robbery	11/20/95	1
18:2113(a)	Bank Robbery	11/09/95	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s)

_ Count(s) _____ (is)(are) dismissed on the motion of the United States.

X It is ordered that the defendant shall pay a special assessment of $100.00 , for count(s) 1 and 2, which shall be due X immediately _ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
147-40-6342 or 147-40-6324; 147-12-6342; 147-40-6345

Defendant's Date of Birth:
11/18/48 or 11/28/48

December 9, 1996
Date of Imposition of Sentence

Defendant's Address:
Union County Jail
15 Elizabeth Plaza
Elizabeth, NJ 07202

/s/ Illegible
Signature of Judicial Officer

Hon. Alfred J. Lechner, Jr., U.S.D.J.
Name & Title of Judicial Officer

Date: January 23, 1997

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 210 months on each of Counts 1 and 2 to run concurrently .

_ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district.

_ at ____ a.m. on _____.
_ as notified by the United States Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
_ before a.m./p.m. on _____.
_ as notified by the United States Marshal.
_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

____ Defendant delivered on _____ to _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on each of Counts 1 and 2 to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant must submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer. If this judgment imposes a restitution obligation, it shall be a conditions [sic] of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall refrain from the illegal possession and/or use of drugs and shall submit to urinalysis or other forms of testing to assure compliance. It is further ordered that the defendant shall submit to drug treatment on an outpatient or inpatient basis, if directed by the U.S. Probation Office. The defendant shall abide by the rules of the program and shall remain in treatment until satisfactorily discharged with the approval of the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment the defendant shall not commit another federal, state or local crime. In addition:

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

_ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 32

Criminal History Category: VI

Imprisonment Range: 210 to 262 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 17,500.00 to $ 175,000.00

X Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ 0

X Full restitution is not ordered for the following reason(s):

Inability to pay full restitution.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

X **The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):**

The defendant's criminal conduct, combined with an extraordinary extensive criminal history, justifies this sentence, and as explained at sentencing.

OR

The sentence departs from the guideline range.

_ upon motion of the government, as a result of defendant's substantial assistance.

_ for the following reason(s):

UNITED STATES of America,

v.

Sylvester MOSLEY, Appellant.

No. 96-5832.

United States Court of Appeals,
Third Circuit.
Argued Aug. 11, 1997.

Decided Sept. 18, 1997.

Faith S. Hochberg, United States Attorney, Kevin McNulty, Elizabeth S. Ferguson, Mark Costello, (argued), Office of the United States Attorney, Newark, NJ, for Appellee.

Donald J. McCauley, (argued), Office of Federal Public Defender, Newark, NJ, for Appellant.

BEFORE STAPLETON, GREENBERG, and COWEN, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

Appellant Sylvester Mosley appeals from a judgment of conviction and sentence entered in the district court on two counts of bank robbery. Mosley argues that the district court erred in failing to instruct the jury that it could convict him of bank larceny as a lesser included offense

of bank robbery.[1] This case raises an issue we have not addressed: whether bank larceny, 18 U.S.C. § 2113(b), is a lesser included offense of bank robbery, 18 U.S.C. § 2113(a). Contrary to the weight of authority, we find that bank larceny is not a lesser included offense of bank robbery. Thus, we will affirm.

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction to review the judgment of the district court pursuant to 28 U.S.C. § 1291. We exercise plenary review over the legal question raised on this appeal. *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.1985).

II. FACTUAL AND PROCEDURAL HISTORY

Count one of the indictment charged Mosley with knowingly and willfully, by force and violence or intimidation, taking approximately $9,344.81 from a teller at the First Fidelity Bank at 233 Fifth Avenue in Paterson, New Jersey, in violation of 18 U.S.C. § 2113(a) and 18 U.S.C. § 2. Count two charged him with knowingly and willfully, by force and violence or intimidation, taking approximately $2,547 from a teller at the First Fidelity Bank at 1008 Madison Avenue in Paterson, New Jersey,

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[1] We also have considered Mosley's claims that the district court abused its discretion in admitting evidence of his prior conviction for bank robbery pursuant to Fed.R.Evid. 404(b) and 403, and that the district court erred in failing to grant him a judgment of acquittal on count two of the indictment pursuant to Fed.R.Crim.P. 29. After careful consideration, we find that neither of these claims justifies reversal so we reject these arguments without further discussion.

also in violation of 18 U.S.C. § 2113(a) and 18 U.S.C. § 2. After a two-day trial, the jury found Mosley guilty on both counts. The district court subsequently sentenced Mosley to concurrent 210-month terms of imprisonment on each count and it imposed concurrent three-year terms of supervised release to follow the custodial terms.

There was no real factual dispute at trial as Mosley conceded in his opening statement to the jury that he entered both banks and took money from them. Rather, his defense was that his conduct did not satisfy the requisite elements of bank robbery in violation of 18 U.S.C. § 2113(a). Nevertheless, we briefly describe the robberies.

1. Count One

A bank teller at First Fidelity Bank on Fifth Avenue testified that she was working at the bank on November 20, 1995, when Mosley approached her window, leaned toward her and said "This is a hold up." He then said "open your bottom drawer and give me all the big bills, start with the big bills first." The teller testified that she was nervous, lost bladder control, and threw the money on the counter. When she asked Mosley if she could go to the bathroom, he replied, "Hurry, hurry, open the drawer and give me the big bills first." She testified that Mosley "gestured to his coat as if he had something there." After throwing the money on the counter, the teller ran to the head teller and stated "I just been held up, I just been held up."

On cross-examination, the teller testified that after giving Mosley the money, she locked the drawer and

started to walk toward the bathroom. When the police interviewed her on the day of the incident, she did not indicate that Mosley had a weapon in his possession.

FBI Special Agent Carolyn Zimmer testified that she interviewed the teller shortly after the robbery and prepared a report regarding the robbery. In that report, Zimmer stated that the teller walked away from her station after the robbery, that Mosley had a "sickly appearance," and that he told the teller that he was "sick."

FBI Special Agent John Conway testified that he arrested Mosley on November 20, 1995, after the robbery charged in count one of the indictment. He stated that Mosley said to him "We robbed the bank, First Fidelity Bank." Conway testified that he never asked Mosley what he meant when he said "rob" and that there was nothing in his report of the robbery regarding threats, force or intimidation. Conway also testified regarding the bank surveillance video tape of the robbery and that it did not reveal evidence of threats, force, intimidation or violence.

Reverend Louis McDowell testified that he was a customer in the bank on November 20, 1995, and was standing directly behind Mosley. McDowell indicated that he did not see Mosley make any motions toward the teller, nor take any actions that he would characterize as indicative of force or violence. He testified that after the robbery Mosley walked past him and out of the bank and that the teller walked away from her station.

2. Count Two

A teller at the First Fidelity Bank, 1008 Madison Avenue, testified that she was working in the bank on November 9, 1995, when a man with a sign reading "HOLD UP" approached her station. She testified that she was scared and nervous and that Mosley placed both of his hands on the counter and asked her for money by saying "Can I have all your money?" The teller testified further that Mosley used a defensive but demanding tone of voice, but said nothing else to her. When she gave Mosley "bait money," he threw it back at her. She then gave Mosley the other money, and Mosley walked away at a fast pace.

On cross-examination, the teller testified that she did not tell either the Paterson police or the FBI agents that she saw Mosley with a weapon, and she told both that Mosley's hands were visible to her throughout the robbery, which lasted approximately five seconds. The teller testified also that Mosley appeared to be homeless, had bags under his eyes, and seemed to be about 60 years old.

Conway testified regarding the surveillance videotape regarding count two of the indictment, as well. He stated that the videotape revealed that Mosley displayed both of his hands on the counter throughout the robbery and that during the three or four seconds of the robbery the videotape did not show Mosley using force, violence or intimidation.

The Paterson police officer who interviewed the teller after the robbery reported that Mosley had not brandished any weapon, and that during the interview, just 16 minutes after the robbery, the teller did not appear to be

upset. The teller working at the station adjacent to the teller approached by Mosley testified that she did not see or hear anything alerting her to the robbery while it was occurring.

III. DISCUSSION

As we have indicated, Mosley acknowledges that he entered the banks and took money as alleged in counts one and two of the indictment. He argues, however, that the court's refusal to charge the jury at his request that it could convict him of bank larceny eliminated his defense that his conduct did not satisfy the required elements of bank robbery.

Mosley argues that he was entitled to a charge that the jury could convict him of bank larceny as a lesser included offense because "every defendant is entitled to have his theory of the case, if it could amount to a legally sufficient defense, based upon the evidence presented at trial, fairly submitted to the jury . . . and that a trial court is bound to give the substance of the requested instruction relating to any defense theory for which there is any foundation in the evidence." Br. at 18. Thus, he relies on the general rule that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988). The government, though recognizing that a defendant is entitled to a charge on a lesser included offense if justified by the evidence, urges that bank larceny is not a lesser included offense of bank robbery. It therefore contends that the

district court correctly rejected Mosley's request to charge bank larceny.

The district court found that

> [t]here simply are no facts in evidence to justify a bank larceny charge. . . . Clearly, there is no basis to suggest that this money was taken with the compliance of these tellers. . . . The evidence is clear that the money was in the cash drawers. As a result of his approach to each of the tellers, they were forced, through intimidation, to retrieve the money from the cash drawers and push it at him. There is nothing to suggest that this was a larceny as that term is used in [section] 2113(a)[sic].

App. at 298.

Our approach in this case is different from that of the district court, as we decide the case predicated on the law rather than on an absence of proof to justify a larceny instruction to the jury. Fed.R.Crim.P. 31(c) permits a jury to return a verdict of guilty as to an offense "necessarily included in the offense charged." However, this rule applies only where the elements of the lesser offense are a subset of the elements of the greater offense. "Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)." *Schmuck v. United States*, 489 U.S. 705, 716, 109 S.Ct. 1443, 1450, 103 L.Ed.2d 734 (1989). This standard involves a textual comparison, looking solely to the elements of the two offenses; inferences arising from the evidence and similarities as to the interests served by the statutes are not relevant. *Id.* at 720, 109 S.Ct. at 1452-53.

We begin, then, by looking to the text of section 2113 which provides that:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association;. . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or in such savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both. . . .

18 U.S.C. §§ 2113(a) & (b).[2] It is obvious that the definition of bank robbery in subsection (a) does not include an element that the defendant have the "intent to steal or purloin." On the other hand, bank larceny as defined in subsection (b) includes this element. A defendant has the intent to steal or purloin if he intends permanently to deprive the rightful owner of the property. *See United States v. Goldblatt*, 813 F.2d 619, 625 (3d Cir.1987). Thus,

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[2] The presence of a threshhold [sic] "exceeding $1,000" in the quoted paragraph of 18 U.S.C. § 2113(b) does not add an element to the offense of bank larceny not present in bank robbery because the next paragraph of section 2113(b) imposes a less severe sentence in those cases "not exceeding $1,000."

we must determine whether the "steal or purloin" provision is included impliedly as an element of bank robbery in subsection (a). If it is not, bank larceny includes an element not included within bank robbery and thus, under *Schmuck*, is not a lesser included offense of bank robbery.

We have held that the subjective intent of a bank robber to steal is irrelevant; "the crime is his resort to force and violence, or intimidation, in the presence of another person to accomplish his purposes." *United States v. Brown*, 547 F.2d 36, 39 (3d Cir.1976) (citations omitted). Thus, it is "immaterial for section[ ] 2113(a) . . . whether the subjective intent of a bank robber is to steal that to which he has no claim or to recover his own deposit." *Id.* In contrast, however, section 2113(b) specifically requires intent to steal or purloin to satisfy the elements of bank larceny. Given this holding in *Brown*, it seems clear that bank larceny cannot be a lesser included offense of bank robbery under the Supreme Court's strictures in *Schmuck*, which indicates that "offenses are statutorily defined." *Schmuck*, 489 U.S. at 716, 109 S.Ct. at 1451.

Nevertheless, while it seems clear to us that bank larceny is not a lesser included offense of bank robbery, there is a conflict among the courts of appeals on this point and, as we pointed out above, the weight of authority is against our position. In these circumstances, we review the cases from the other courts of appeals. We start with *United States v. Gregory*, 891 F.2d 732, 734 (9th Cir.1989), which reached our result that, under *Schmuck*, bank larceny is not a lesser included offense of bank robbery. *Gregory* reached this result because "[b]ank larceny . . . contains a specific intent element which need not

be proved in the bank robbery context. . . . [Hence] bank larceny cannot be 'necessarily included' in bank robbery." *Id.* at 734. Thus, we are not alone in our holding on this appeal.

We are particularly impressed by the insightful discussion of the issue in *United States v. Brittain*, 41 F.3d 1409 (10th Cir.1994). While ultimately holding that bank larceny is a lesser included offense of bank robbery, the court expressed its hesitance to do so.[3] Accordingly, notwithstanding its actual holding, we find support in the *Brittain* court's extensive analysis supporting a conclusion contrary to its holding. As the *Brittain* court explained, "[f]irst and foremost, the language of § 2113 calls into question [the] conclusion that bank robbery contains all the elements of bank larceny." *Id.* at 1412-13. The *Brittain* court focused specifically on the "intent to steal or purloin" element that is contained in bank larceny but not bank robbery. The decisions that find bank larceny a lesser included offense must infer that intent to

[3] The *Brittain* court so held because it found itself bound by its previous holdings. Yet it clearly indicated that it might not have reached its holding in the absence of binding precedent. In fact, a fair reading of *Brittain* confirms that a majority of the court believed that bank larceny is not a lesser included offense in a bank robbery case. Judge Brown, who wrote the majority opinion, made it clear that he reached the contrary conclusion only because of circuit precedent. Judge Baldock dissented on the ground that *Schmuck* rejected the reasoning in the circuit precedent. In his view, *Gregory* set forth the correct analysis under *Schmuck*. *Brittain*, 43 F.3d at 1417 (dissenting opinion). Only Judge Ebel apparently thought that, even using a *Schmuck* analysis, bank larceny was a lesser included offense of bank robbery. *Id.* at 1416 (concurring opinion).

steal or purloin is also an element of bank robbery. Also, while section 2113(b) requires a showing of taking and carrying away of money or property, section 2113(a) does not include the carrying away language.

The *Brittain* court also discussed the history of section 2113 to illustrate its reluctance to hold that bank larceny is a lesser included offense of bank robbery. The court recognized that there is no indication in the legislative history that Congress intended section 2113(a) to contain an "intent to steal" element identical to section 2113(b). *Id.* at 1413. The court explained that Congress initially passed the bank robbery legislation in 1934, and, though both robbery and larceny provisions were proposed, the larceny provision was deleted from the legislation. Congress added a larceny provision three years later in reaction to a case in which a man walked into a bank and, without confronting any bank employees, helped himself to $11,000. *Id.* at 1413 (citing *Bell v. United States*, 462 U.S. 356, 365 n. 4, 103 S.Ct. 2398, 2403 n. 4, 76 L.Ed.2d 638 (1983) (Stevens, J., dissenting)). Thus, the larceny statute seemed designed to address a different factual scenario than the typical bank robbery case.

We recognize that there is another conceivable reading of the development of the legislation. Inasmuch as both robbery and larceny were offenses at common law, it might be argued that Congress intended to incorporate the intent element of the common law crimes into section 2113.[4] However, there is no indication in the legislative

[4] The *Brittain* court questioned the plausibility of this argument in light of the Supreme Court's statement in *Bell v.*

history that Congress so intended. The *Brittain* court suggested that an "intent to steal" element within the bank robbery provision would have been implied more easily from the bank robbery statute as it originally was written, as that version included an element of "feloniously" taking property. The term felonious could have been understood as including an intent requirement. *Brittain*, 41 F.3d at 1413. However, when Congress revised the criminal code in 1948, it deleted the word "feloniously" from section 2113(a). The Revisor's Notes indicate that this was considered only a "change in phraseology." *Brittain* 41 F.3d at 1414 (citing *Prince v. United States*, 352 U.S. 322, 326 n. 5, 77 S.Ct. 403, 406 n. 5, 1 L.Ed.2d 370 (1957)). And though it seems that the deletion of "feloniously" was a result of Congress' effort to delete references to felonies and misdemeanors from the code, inasmuch as both terms were defined in 18 U.S.C. § 1 (repealed), Congress' failure to give some indication that intent was to remain an element of bank robbery may provide support for the proposition that intent was not conceived as an element of the crime. *See United States v. Richardson*, 687 F.2d 952, 957 (7th Cir.1982).

Thus, the *Brittain* court found that the history of the statute mandated against a finding that bank larceny is a lesser included offense of bank robbery. Accordingly, at most, the revisions to the criminal code provide minimal guidance as to the meaning of section 2113. For this reason, we find even more helpful to our conclusion that

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United States, 462 U.S. at 360, 103 S.Ct. at 2401, that the phrase "with intent to steal or purloin" in subsection 2113(b) "has no established meaning at common law." *Brittain*, 41 F.3d at 1413.

bank larceny is not a lesser included offense of bank robbery, the combination of both the literal words of the statute and the factual history underlying the enactment of the larceny statute.

We recognize that the Courts of Appeals for the First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have held, or at least indicated, that bank larceny is a lesser included offense of bank robbery. *See United States v. Henson*, 945 F.2d 430, 440 (1st Cir.1991) (stating that "failure to instruct on the lesser charge of bank larceny" not plain error); *United States v. Carter*, 540 F.2d 753, 754 (4th Cir.1976) (holding that court must instruct jury on lesser included offense of bank larceny where there is factual dispute as to existence of force and violence or intimidation but affirming because evidence did not require larceny instruction); *United States v. Walker*, 75 F.3d 178 (4th Cir.) (same), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2513, 135 L.Ed.2d 202 (1996); *United States v. Flint*, 534 F.2d 58, 60 (5th Cir.1976) (affirming district court's refusal to give instruction on lesser included offense of bank larceny because there was no factual dispute as to the presence of intimidation or violence but indicating that bank larceny is a lesser included offense in a bank robbery indictment); *United States v. Perry*, 991 F.2d 304, 307 (6th Cir.1993) ("[T]he court declined to instruct the jury on the lesser included offense of bank larceny, 18 U.S.C. § 2113(b)."); *United States v. Cady*, 495 F.2d 742, 747-48 (8th Cir.1974) (recognizing that bank larceny is a lesser included offense of bank robbery under section 2113); *United States v. Brittain*, 41 F.3d 1409; *United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir.1996) (acknowledging, without discussion, that bank larceny is a lesser

included offense of bank robbery).[5] In our view, these opinions are not consistent with the methodology of *Schmuck*. Therefore, we reject the majority view that bank larceny is a lesser included offense of bank robbery.

IV. CONCLUSION

In view of the aforesaid, we hold that the district court's refusal to grant Mosley's request for a jury instruction on bank larceny was proper as bank larceny is not a lesser included offense of bank robbery.[6] We

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[5] The Court of Appeals for the Seventh Circuit has conflicting holdings on this issue. In 1969, the court held that "[t]his is not an instance of 'lesser-included offense' which would have entitled defendant to the jury instruction he sought, since the commission of either crime is made unlawful by the same statutory section and one is not 'lesser' than the other." *United States v. Hephner*, 410 F.2d 930, 934 (7th Cir.1969). In contrast, the court held in 1996 (without reversing or even commenting on the earlier holding) that "[a]s an element of the crime of bank robbery, 18 U.S.C. § 2113(a), the government must prove that the accused committed the crime 'by force and violence, or by intimidation.' This element is missing from the lesser included crime of bank larceny under 18 U.S.C. § 2113(b)." *United States v. Sandles*, 80 F.3d 1145, 1147 n. 1 (7th Cir.1996).

[6] We recognize that our result will mean that if a jury concludes that a defendant did not use force and violence or intimidation in a bank robbery case, but nevertheless intended to steal or purloin the property or money, it must acquit the defendant if the indictment is only for bank robbery. We, however, express no view on whether a grand jury may indict a defendant for both bank robbery and bank larceny by reason of a single incident, as that issue is not involved here. Finally, we

accordingly will affirm the conviction and sentence of the district court entered December 11, 1996.

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note that Mosley does not contend that the evidence cannot support the bank robbery conviction on count one.

Supreme Court of the United States

No. 97-7213

Sylvester Mosley,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

March 23, 1998